the film cannot be used to reproduce the picture, either in the trial court or in the appellate court. It would seem, therefore, that the evidence of eyewitnesses, who had seen this representation presented only for a moment, would be competent evidence of the fact of publication. The appellant's counsel has apparently with diligence found authorities to sustain this reasoning.

"In Frolich and Schwartz, Law of Motion Pictures, p. 598, it was held: 'The proper method of proving the exhibition of a motion picture is not by the production of the film, but by witnesses who saw it reproduced.'

"This is based upon the case of Glyn *v.* Weston Feature Film Company, Ltd., 114 Law Times Reports, 354. There are authorities holding that the rule as to the best evidence applies only to written documents, and there are even authorities which hold that a photograph itself is not necessarily the best evidence of a representation. It is not necessary here to go to that extent, because there is no printed photograph as the result of this representation, which could be used as better evidence than the evidence of eyewitnesses who saw it. That a chattel or an article need not be produced as the best evidence, but may be proven by description, is held in Queen *v.* Francis, L. R. 2 C. C. R. 128; Lucas *v.* Williams, 66 L. T. Supp. 206; R. *v.* Hunt, 3 B. & Ald. 566; Commonwealth *v.* Morrell, 99 Mass. 542; Commonwealth *v.* Welsh, 142 Mass. 473, 8 N. E. 342; 2 Elliott on Evidence, § 1230."

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**Constitutional Law—Food Control Act Unconstitutional.**—In Detroit Creamery Co. *v.* Kinnane, 264 Fed. 845, the United States District Court for the Eastern District of Michigan held that the Food Control Act Aug. 10, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 ⅛ff), as amended by Act Oct. 22, 1919, § 2 is unconstitutional.

The court said in part: "The only question, therefore, now involved, is whether the provision of section 4 of this Lever Act. as amended, to the effect that 'it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries,' is constitutional.

"The Sixth Amendment to the federal Constitution provides that—

"'In all criminal prosecutions, the accused shall enjoy the right * * * to be informed the nature and cause of the accusation.'

"It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an 'unjust' or 'unreasonable' rate or charge in handling or dealing in or with any necessaries, would be wholly insufficient to inform such perpon of the nature and cause of the accusation thus made.

"Such an indictment, however, could not specify the offense thus

charged with any more detail, for the reason that the statute purporting to create such offense does not state the facts, acts, or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this quesion. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the unreasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?

"These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion or opinion of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law. United States *v.* Brewer, 139 U. S. 278, 11 Sup. Ct. 538, 35 L. Ed. 190; Louis-

ville & Nashville R. Co. *v.* Railroad Commission of Tennessee (C. C.) 19 Fed. 679; Tozer *v.* United States (C. C.) 52 Fed. 917; Hocking Valley Ry. Co. *v.* United States, 210 Fed. 735, 127 C. C. A. 285; United States *v.* L. Cohen Grocer Co., 264 Fed. 218 (recent unreported decision of the United States District Court for Eastern District of Missouri); United States *v.* Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68; Louisville & Nashville R. R. Co. *v.* Commonwealth, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457."

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**Gifts—Check Given to Payee but Not Cashed before Drawer's Death.**—In Edwards *v.* Guaranty Trust & Savings Bank, 190 Pac. 57, the California District Court of Appeals held that where the donor's check, given to the payee as a gift, and presented to the drawee bank prior to drawer's death, was not accepted or paid before such death, although payment was rejected without any malicious or wrongful intent, for a reason later shown to be incorrect, there was no valid gift.

The court said in part: "In the case of Provident, etc., *v.* Sisters, etc. 87 N. J. Eq. 424, 100 Atl. 894, the Court of Chancery of New Jersey had before it a case in its material aspects very similar to the case at bar. Mrs. Bowdoin, an old lady, 86 years of age, had died in the hospital. The day before her death she gave a check to the defendant in that case for $3,000. On the same day the check was given it was presented at the bank upon which it was drawn, and payment was refused, not absolutely, but until investigation could be made. The old lady died the next day, and before any further efforts to collect the check were made. The court in that case—which is a well-considered case, and very illuminating and instructive—among other things said:

" 'It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit when the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes, or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift, to be effective, must place the thing donated beyond the control of the donor. Where a check on a bank of deposit is given for value, it often operates as an equitable assignment, but such is not the case where a check is given to the payee as a pure donation. * * * It cannot be questioned in this case that, if Mrs. Bowdoin had given a check on an ordinary bank of deposit, no gift would have been effected until the check had been cashed. Nor does it make any difference what may delay or prevent the check from being cashed.'

"We are in full accord with this reasoning and the conclusion